



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 23 2011

OFFICE OF
CIVIL RIGHTS

Return Receipt Requested

Certified Mail# 7004-2510-0004-2241-7159

In Reply Refer to:

EPA OCR File No. 13R-06-R4

Mr. Lance R. LeFleur
Director
Alabama Department of Environmental Management
1400 Coliseum Blvd.
Montgomery, AL 36130-2400

Re: Dismissal of Title VI Administrative Complaint

Dear Mr. LeFleur:

This letter is to notify the Alabama Department of Environmental Management (ADEM) that the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) is dismissing the administrative complaint dated August 21, 2006, filed with OCR pursuant to EPA's regulations implementing Title VI of the Civil Rights Act of 1964, as amended (Title VI),¹ by Friends of Five Mile Creek (Complainant) against ADEM. ADEM is a recipient of EPA funds. The Complaint concerns ADEM's process of permitting the New Georgia Landfill (NGL) in Jefferson County, Alabama. The Complaint alleges that ADEM failed to abide by the Alabama Solid Wastes Disposal Act (SWDA) when it approved the New Georgia Landfill permit on July 11, 2006, and this approval resulted in a disparate impact on the African American residents in Jefferson County, Alabama.

The Complaint met EPA's four jurisdictional requirements set forth in 40 C.F.R. Part 7 and OCR accepted the Complaint for investigation on December 19, 2008.² During the course of OCR's investigation of the disparate impact allegation, Alabama Governor Robert Bentley signed Alabama Executive Order No. 8 (EO No. 8).³ OCR is dismissing without prejudice the disparate impact allegation based on EO No. 8 for the reasons set forth below.

¹ 42 U.S.C. §§2000d et seq.

² Letter from Karen D. Higginbotham, Director, Office of Civil Rights, US EPA, to Friends of Five Mile Creek, c/o Shaun Thistlethwaite, et al., Re: Acceptance of Administrative Complaint. (December 19, 2008)

³ Ala. Exec. Order No. 8 (Feb. 23, 2011), *see also* http://governor.alabama.gov/news/news_detail.aspx?ID=4704.

I. LEGAL FRAMEWORK

Title VI prohibits discrimination based on race, color, or national origin under any program or activity⁴ receiving federal financial assistance.⁵ Under Section 601 of Title VI,

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.⁶

This section prohibits intentional discrimination.⁷ In addition, Section 602 “authorize[s] and direct[s]” federal departments and agencies that extend federal financial assistance “to effectuate the provisions of section [601] . . . by issuing rules, regulations, or orders of general applicability.”⁸ At least forty federal agencies have adopted regulations that prohibit disparate impact discrimination pursuant to this authority.⁹ The Supreme Court has recognized that such regulations may validly prohibit practices having a disparate impact on protected groups, even if the actions or practices are not intentionally discriminatory.¹⁰ The United States Environmental Protection Agency's Title VI implementing regulations are codified at 40 C.F.R. Part 7. Under these regulations, a recipient of EPA financial assistance may not intentionally discriminate or use policies or practices that have a discriminatory effect based on race, color, or national origin.

As provided at 40 C.F.R. section 7.120, administrative complaints alleging discriminatory acts in violation of 40 C.F.R. Part 7 may be filed with the Agency. EPA reviews accepted complaints in accordance with 40 C.F.R. Part 7, Subpart E (§§ 7.105-7.135).

II. ALLEGATION

On December 19, 2008, OCR accepted the following allegation for investigation:

ADEM's failure to abide by the Alabama Solid Wastes Disposal Act (SWDA) when they approved the New Georgia Landfill permit on July 11, 2006,

⁴ The Civil Rights Restoration Act of 1987 broadly defines “program or activity” to include all of the operations of an entity, any part of which receives federal assistance. 42 U.S.C. § 2000d-4a.

⁵ 42 U.S.C. §§ 2000d et seq. (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”)

⁶ 42 U.S.C. § 2000d.

⁷ See *Alexander v. Choate*, 469 U.S. 287, 293 (1985); *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 607-08 (1983).

⁸ 42 U.S.C. § 2000d-1.

⁹ See *Guardians*, 463 U.S. at 619 (Marshall, J. dissenting).

¹⁰ See *Alexander*, 469 U.S. at 292-94; *Guardians*, 463 U.S. at 582; *Elston v. Talladega County Bd. Of Educ.*, 997 F.2d 1394, 1406, *reh’g denied*, 7 F.3d 242 (11th Cir. 1993).

resulted in a disparate impact on the African American residents in Jefferson County, Alabama.¹¹

The Complaint states that ADEM failed to abide by the Alabama SWDA when approving the NGL permit on July 11, 2006 by:

- 1) Failing to consider safety and social-economic impacts during the siting and permitting of the NGL;
- 2) Refusing to consider any factors outside the realm of the Subtitle D regulations when considering a permit application;
- 3) Not considering the need for such a landfill in the jurisdiction; and
- 4) Not considering the relationship of the proposed site to major transportation arteries and other roads.

The Complaint asserts that numerous adverse effects of ADEM's criteria or methods of implementing its solid waste permit program at NGL, fall disproportionately on African American residents in Jefferson County, and that the percentage of African Americans around the NGL (whether within 1-mile, 2-mile, 3-mile, or 4-mile radius) far exceed the percentage of African Americans in the service area of the NGL and in the State of Alabama. Complainant contends that the proposed NGL will cater predominantly to White citizens, but the effects of the landfill will fall predominantly on the Black citizens.¹²

III. EXECUTIVE ORDER

During the course of OCR's investigation of this allegation, on February 23, 2011, Alabama Governor Robert Bentley issued Alabama EO No. 8. EO No. 8 places a moratorium on any new or modified permit or transfer of any existing permits for certain solid waste management facilities until ADEM, with input from the Solid Waste Management Advisory Committee and the Alabama Department of Public Health, can adopt and promulgate new rules, regulations and requirements for permitting certain solid waste management facilities and landfills. These new regulations shall take into account certain immediate and long-term effects of such facilities on the adjacent community, the region, other regions of Alabama, and Alabama as a whole. The effects that the new regulations must consider include a range of impacts.

Specifically, the EO directs the following:

- 1) [T]he Alabama Department of Environmental Management, with input from the Solid Waste Management Advisory Committee and the Alabama Department of Public Health, to adopt and promulgate new rules, regulations and requirements for permitting solid waste management facilities and landfills which will have, upon completion or by expansion, either:
 - a. A proposed capacity in excess of 1,500 tons per day;
 - b. A proposed capacity of 2,000 cubic yards per day or more;

¹¹ See fn. 2.

¹² *Id.*

- c. A site consisting of 500 acres or more;
 - d. When combined with existing or proposed facilities located within the same county or counties within 20 miles thereof, a capacity or site which exceeds the minimum amounts set forth in subparagraphs (1), (2) or (3), above; or,
 - e. A proposed capacity whether new or by expansion which will be more than that reasonable anticipated in the foreseeable future for the communities located within the county in which the facility is to be located or within 20 miles of the facility.
- f. The new regulations shall take into account the immediate and long-term effects of facilities on the following with respect to not only the adjacent community or region, but other regions of the State of Alabama and the State of Alabama as a whole:
- a. Infrastructure, including, but not limited to, roads and bridges;
 - b. Public services
 - c. Reputation;
 - d. Public perception, including, but not limited to, the perception of those living outside of the region and out-of-state;
 - e. Environment, including, but not limited to, air and water quality;
 - f. Health;
 - g. Safety;
 - h. Recreation;
 - i. Natural resources;
 - j. Economic Development;
 - k. Public convenience (or inconvenience); and,
 - l. Such other and further matter as the Department of Environmental management, the Department of Public Health, and the Solid Waste Advisory committee believe to be in the best interest of the citizens of the immediately impacted area, the region in which the facility will be located, neighboring regions and the entire State of Alabama.

It is OCR's standard practice to dismiss without prejudice administrative complaints where the same subject matter will be addressed or impacted via an external process. OCR understands that the new rules, regulations and requirements for permitting solid waste management facilities and landfills will take into account the effect of a facility on infrastructure, public services, reputation, public perception, environment (including, but not limited to, air and water quality), health, safety, recreation, natural resources, economic development, public convenience (or inconvenience), and other matters that ADEM believes to be in the best interest of the citizens of the immediately impacted area, the region in which the facility will be located, neighboring regions and the entire State of Alabama. The adverse impacts alleged in this complaint include environmental impacts (including concerns regarding land, water, and air quality and concerns regarding heavy metal contamination), economic impacts (concerns regarding the tax burden on residents, slowing of business development, impacts on property values, etc.), as well as noise, traffic, litter, and safety concerns. Because the NGL has a capacity of over 2,000 cubic yards per day (NGL has a capacity of 4,800 cubic yards per day), NGL will be subject to the rules, regulations, or

requirements ADEM promulgates as directed by this EO. Therefore, because the new rules, regulations and requirements developed by ADEM pursuant to the EO would apply to the landfill at issue in this complaint and may address the impacts raised in this complaint, OCR is dismissing without prejudice the disparate impact allegation against ADEM.

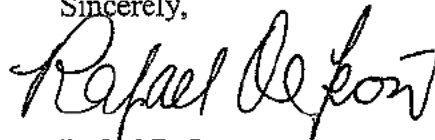
Because this allegation has been dismissed without prejudice, it may be refiled if, following the effective date of the new rules, regulations and requirements for permitting solid waste management facilities and landfills, Complainant believes that adverse disparate impacts exist. A complaint must be filed within 180 calendar days of the effective date of the new rules, regulations, or requirements implemented by ADEM pursuant to EO 8.

IV. CONCLUSION

OCR is dismissing without prejudice the allegation in order for ADEM to have an opportunity to promulgate the rules, regulations, or requirements directed by Alabama EO No. 8, which may address the Complainant's allegations. However, Complainant may refile the allegation if Complainant believes that an adverse, disparate impact exists following promulgation of the rules, regulations, or requirements implemented by ADEM pursuant to Alabama EO No. 8. If Complainant intends to refile, Complainant must refile within 180 calendar days of the effective date of the new rules, regulations, or requirements implemented by ADEM pursuant to EO 8.

If you have any questions, please contact Helena Wooden-Aguilar, Assistant Director, Office of Civil Rights by telephone at 202-564-0792, by email at wooden-aguilar.helena@epa.gov or by mail at U.S. EPA, 1200 Pennsylvania Ave., NW, Mail Code 1201A, Washington, D.C., 20460-0001.

Sincerely,



Rafael DeLeon
Director

cc: Friends of Five Mile Creek



Stephen G. Pressman, Associate General Counsel
Civil Rights Finance & Law Office (MC 2399A)

Teresea Murray, EEO Officer
EPA Region IV

Nancy Tommelleo, Title VI Contact
EPA Region IV